

Hon. Robert S. Lasnik

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ROBERTA PICU and SEVER PICU,

Plaintiffs,

v.

MARIANA BOT, individually and as a  
member of a marital community; DOREL  
BOT, individually and as a member of a  
marital community, and DUVALL ADULT  
FAMILY HOME,

Defendants.

Case No. 2:14-cv-00330-RSL

(removed from Superior Court Case  
No. 14-2-05726-1)

**DEFENDANTS' PARTIAL MOTION  
TO DISMISS PLAINTIFFS'  
COMPLAINT**

**NOTED FOR HEARING:  
Friday, April 11, 2014**

**I. INTRODUCTION**

Defendants hereby move to dismiss four of the five claims brought against them by Plaintiffs Roberta Picu and Sever Picu, two former independent contractors who provided services at the Duvall Adult Family Home.<sup>1</sup> In their Complaint, Plaintiffs seek to recover back wages, including minimum and overtime pay, alleging violations of federal and state wage laws. In addition to their federal and state law wage claims, Plaintiffs assert causes of action for breach

<sup>1</sup> In filing this partial motion to dismiss ("Motion"), Defendants seek leave from the Court to permit them to answer Plaintiffs' Complaint after the Court rules on this Motion.

1 of an oral contract, fraud, and violations of Washington's Consumer Protection Act ("CPA").  
 2 They seek consequential damages, emotional distress damages, double wages under  
 3 Washington's Minimum Wage Act ("MWA"), treble damages under RCW 19.86.090, and  
 4 attorney fees. The facts before the Court, however, establish that Plaintiffs' wage, fraud and  
 5 CPA claims are defective as a matter of law. For the reasons set forth herein, Plaintiffs have  
 6 failed to state claims upon which relief may be granted and these causes of action should be  
 7 dismissed.

## 8 II. STATEMENT OF FACTS

9 Plaintiffs commenced this action in King County Superior Court and Defendants timely  
 10 removed the action to this Court on federal question grounds, *to wit*, Plaintiffs allege a cause of  
 11 action under the Fair Labor Standards Act ("FLSA").

12 Defendant Duvall Adult Family Home ("DAFH") is a licensed adult family home located  
 13 in Duvall, Washington which provides round the clock care to elderly and disabled persons.  
 14 Complaint, ¶¶ 1, 2, 45. Plaintiffs allege that defendants Mariana and Dorel Bot are the owners of  
 15 DAFH.<sup>2</sup> *Id.* at ¶ 3. Plaintiffs are a married couple who previously provided services at DAFH.  
 16 *Id.* at ¶ 6. Namely, from November 1, 2011 to May 14, 2012 and again from August 31, 2012  
 17 until November 30, 2012, Plaintiffs served as live-in attendants and provided care to DAFH's  
 18 elderly and disabled residents. *Id.* at ¶¶ 6, 19-21. During the relevant time period, both Plaintiffs  
 19 were certified nursing assistants. *Id.* at ¶¶ 7-9.

20 DAFH engaged Plaintiffs' services pursuant to an oral contract – there was no written  
 21 agreement. *Id.* at ¶ 35. Pursuant to the terms of the oral agreement, Plaintiffs received \$3,000.00  
 22 in addition to room and board per month in exchange for their work at DAFH.<sup>3</sup> *Id.* at ¶¶ 48-49.  
 23 According to Plaintiffs, they each worked 160 hours per week. *Id.* at ¶¶ 52-53. They further

24 <sup>2</sup> It will be specifically denied that Dorel Bot has any ownership in DAFH.

25 <sup>3</sup> In their Complaint, Plaintiffs allege that Defendants agreed to pay each Plaintiff \$3,000.00 per month. Complaint,  
 26 ¶¶ 48-49. Defendants vehemently dispute this. Rather, DAFH agreed to pay Plaintiffs a combined total of  
 \$3,000.00 per month, in addition to providing free room and board. However, for purposes of this motion to dismiss  
 only, Defendants accept as true, as they are so required, Plaintiffs' factual allegations.

1 allege that during the nine and half months that they provided services at DAFH, Defendants did  
 2 not pay Mrs. Picu any compensation whatsoever<sup>4</sup> (*id.* at ¶¶ 54-56) and that Defendants did not  
 3 pay Mr. Picu overtime wages. *Id.* at ¶ 57. Further, Plaintiffs assert that Defendants made  
 4 "representations" to the Plaintiffs about their employment that were material and false and that  
 5 Defendants supplied "false information" about the terms of Plaintiffs' employment. *Id.* at ¶¶ 67-  
 6 68.

7 Finally, Plaintiff argue in the alternative that if they are deemed independent contractors  
 8 rather than employees, Defendants' failure to pay Mrs. Picu \$3,000 per month was an unfair and  
 9 deceptive act or practice in trade or commerce. *Id.* at ¶ 69.

### 10 III. LEGAL ARGUMENT

11 To satisfy the applicable pleading requirements of Rules 8(a) and 12(b)(6), a party must  
 12 allege "sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'" *Danforth & assocs., Inc. v. Coldwell Banker Real Estate, Inc.*, 2011 WL 338798 at \*1 (W.D.  
 13 Wash. Feb 3, 2011) (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)) (other internal  
 14 quotation marks and citations omitted). A claim is "plausible" only if a plaintiff alleges facts  
 15 that allow the Court to reasonably infer that the defendant is liable for the alleged misconduct.  
 16 *Danforth*, 2011 WL 338798, at \*1. Bare assertions and conclusory statements are not sufficient  
 17 to withstand a motion to dismiss. Rather, a party must allege facts that "cross the line between  
 18 possibility and plausibility of entitlement to relief." *Iqbal*, 129 S. Ct. at 1949. Plaintiffs have not  
 19 done that here.

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<sup>4</sup> It is worth noting that, according to Plaintiffs' allegations, Mrs. Picu would have worked 6 and ½ months (*i.e.*,  
 from November 1, 2011 until May 13, 2012) without receiving any compensation, quit, taken 3 and ½ months off  
 (*i.e.*, from May 14, 2012 until August 31, 2012), and then, despite never having received compensation for her  
 previous 6 ½ months of services, nonetheless, went back to DAFH and provided services for another 3 months (*i.e.*,  
 September 1, 2012 through November 30, 2012) without being compensated.

**A. Plaintiffs Fail to State a Claim Under the FLSA for Overtime.**

Plaintiff's statutory wage claims fail, too. The FLSA allows certain employees to sue an employer who fails to pay them the federally mandated minimum wage or fails to pay them overtime rates for hours worked in excess of 40 per week. 29 U.S.C. §§ 206, 207. However, in this case, Plaintiffs are exempt from the FLSA's minimum wage and overtime requirements under at least two well-established exemptions. First, they are exempt from the FLSA's minimum wage and overtime requirements under the Companionship Exemption. 29 U.S.C. § 213(a)(15); *see also Park v. Choe*, C06-5456RJB, 2007 WL 2677135 (W.D. Wash. Sept. 10, 2007). Plaintiffs are also exempt from the FLSA's overtime requirements under the Live In Domestic Service Employee Exemption. 29 U.S.C. § 213(b)(21). Accordingly, Plaintiffs have failed to state a viable FLSA claim and such claim should be dismissed with prejudice.

**1. The Companionship Exemption Applies Here.**

The FLSA minimum wage and overtime provisions do not apply to "any employee ... employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves." 29 U.S.C. § 213(a)(15).<sup>5</sup> The applicable regulations provide that, as used in § 13(a)(15) of the Act, the term "domestic service employment" refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed. The term expressly includes caretakers. 29 C.F.R. § 552.3. "Companionship services" for the

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<sup>5</sup> For purposes of this Motion only, Defendants will not contest the employer/employee relationship. However, it is Defendants' position that Plaintiffs, at all material times, were independent contractors.

1 aged or infirm are defined as “those services which provide fellowship, care and protection for a  
 2 person who because of advanced age or physical or mental infirmity cannot care for his or her  
 3 own needs.” 29 C.F.R. § 552.6.  
 4

5 It is undisputed that Mr. and Mrs. Picu were engaged in companionship services as  
 6 defined by the applicable regulations. Namely, they lived at DAFH were responsible for the care  
 7 of the residents. Complaint, ¶¶ 30-33. The Companionship Exception applies and the Picus are  
 8 not entitled to minimum wage or overtime pursuant to 29 U.S.C. § 213(a)(15).  
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## 10 **2. Certified Nursing Assistants Do Not Fall Under The Trained** 11 **Personnel Exemption.**

12 The term “companionship services” does not include services relating to the care and  
 13 protection of the aged or infirm which require and are performed by trained personnel, such as a  
 14 registered or practical nurse. 29 C.F.R. § 552.6. Hence, the regulations carve out an exception  
 15 to the companionship exemption for trained personnel such as registered or practical nurses.  
 16 Accordingly, Plaintiffs are excluded from minimum wage protection unless they qualified as  
 17 “trained personnel,” which they do not.  
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19 Here, Plaintiffs allege that from November 1, 2012 to November 30, 2012, they were  
 20 certified nursing assistants. Complaint, ¶ 9. Authoritative case law holds that Certified Nursing  
 21 Assistants (“CNAs”) do not fit within the Department of Labor’s (“DOL”) trained personnel  
 22 exemption which extends minimum wage coverage to trained personnel such as licensed  
 23 practical nurses. *McCune v. Oregon Sr. Services Div.*, 894 F.2d 1107, 1110-11 (9<sup>th</sup> Cir. 1990).  
 24 Accordingly, the Picus do not fall under this limited exception to the Companionship Exemption.  
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### 3. The Live In Domestic Service Employee Exemption Applies Here.

In addition to the fact they are exempt from the minimum wage and overtime provisions of the FLSA by virtue of the Companionship Exemption, Plaintiffs are also exempt from the FLSA's overtime provisions under the Live In Domestic Services Employee Exemption. The overtime provisions of the FLSA do not apply to "any employee who is employed in domestic service in a household and who resides in such household." 29 U.S.C. § 213(b)(21). The U.S. Department of Labor ("DOL") has further explained this exemption by regulation:

Domestic service employees who reside in the household where they are employed are entitled to the same minimum wage as domestic service employees who work by the day. However, section 13(b)(21) provides an exemption from the Act's overtime requirements for domestic service employees who reside in the household where employed. But this exemption does not excuse the employer from paying the live-in worker at the applicable minimum wage rate for all hours worked. In determining the number of hours worked by a live-in worker, the employee and the employer may exclude, by agreement between themselves, the amount of sleeping time, meal time and other periods of complete freedom from all duties when the employee may either leave the premises or stay on the premises for purely personal pursuits. For periods of free time (other than those relating to meals and sleeping) to be excluded from hours worked, the periods must be of sufficient duration to enable the employee to make effective use of the time. If the sleeping time, meal periods or other periods of free time are interrupted by a call to duty, the interruption must be counted as hours worked.

29 C.F.R. § 552.102(a). *See also* 29 C.F.R. § 100(a)(2) (live in domestic service employees are exempted from the FLSA's overtime requirements).

The Live In Domestic Services Employee Exception to the FLSA's overtime provisions applies here because the Picus provided domestic services (*e.g.*, caregiver) and resided in the household. Complaint ¶¶ 30-31; 29 C.F.R. § 552.3. Thus, the Picus are not entitled to overtime

1 for the work they performed at DAFH by virtue of being domestic service employees who  
 2 resided at DAFH.

3  
 4 **B. Plaintiffs Fail to State a Claim Under Washington's Minimum Wage Act for Overtime.**

5 Plaintiffs next seek to recover damages under Washington's Minimum Wage Act, RCW  
 6 49.52.070, which gives an employee a right of action against an employer who willfully deprives  
 7 the employee of "wage" the employer is "obligated to pay" under RCW 49.52.070.

8 Like their federal wage claim, Plaintiffs' wage claim under Washington State law also fails to  
 9 state a claim upon which relief may be granted. "Any individual whose duties require that he or  
 10 she reside or sleep at the place of his or her employment," is not a covered employee under the  
 11 MWA. RCW 49.46.010(5)(j). Here, Mr. and Mrs. Picu were required to sleep at DAFH.

12 Complaint, ¶¶ 33-34. Accordingly, they are exempted from coverage under the WMWA. *Park*,  
 13 2007 WL 2677135 at \*6.

14  
 15 **C. Plaintiffs Have Not Pled a Claim for Fraud and/or Negligent Misrepresentation.**

16 Plaintiffs' fraud claim fails for at least two reasons. First, Plaintiffs do not come close to  
 17 satisfying the heightened pleading standard of Fed. R. Civ. P. 9(b). Under Rule 9(b), the  
 18 "circumstances constituting fraud" must be stated "with particularity." Plaintiffs have failed to  
 19 articulate their fraud claims with sufficient particularity and these must be dismissed. The  
 20 elements necessary to establish fraud, all of which must be shown by clear, cogent, and  
 21 convincing evidence, include a representation of an existing fact; its materiality; its falsity; the  
 22 speaker's knowledge of its falsity; his intent that it shall be acted upon by the person to whom it  
 23 is made; ignorance of its falsity on the part of the person to whom it is addressed; the latter's  
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1 reliance on the truth of the representation; his right to rely upon it; and his consequent damage.  
2 *Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996).

3 Here, Plaintiffs generically claim that Defendants "made representations" to them about  
4 their employment that were "material and false" and that the "defendants supplied false  
5 information about the terms of the Plaintiffs' employment for the guidance of the Plaintiffs in  
6 their business transactions." Complaint, ¶¶ 67, 68. Plaintiffs do not allege what these  
7 purportedly false representations were. Nor do they allege who exactly made such  
8 misrepresentations. Indeed, they allege no details whatsoever to support their claims of fraud  
9 and negligent misrepresentation. A fraud claim in which neither the challenged representation  
10 nor the purported speaker is identified does not even provide notice, much less the specificity  
11 required when serious and reputation damaging accusations are leveled against businesses or  
12 individuals. Plaintiff's bare and conclusory allegations of fraud and misrepresentations do not  
13 withstand the heightened pleading requirements of Rule 9(b) and should be dismissed.

14 Second, the fraud claim is incompatible with the existence of the parties' contract. The  
15 "fraud" alleged here consists of "false information about the terms of the Plaintiffs'  
16 employment." Complaint, ¶ 68. The alleged failure to perform in accordance with the terms of  
17 the parties' oral contract is not fraud – it would be a breach of contract. Fraud depends on a  
18 misrepresentation of existing fact; the terms of a contract, by contrast, are promises that  
19 something will be done in the future. *Shook v. Scott*, 56 Wn.2d 351, 355 (1960). Contractual  
20 promises are distinct from factual representations, and the distinction is important: "[W]ere the  
21 rule otherwise, any breach of contract would amount to fraud." *Id.* (internal quotation marks and  
22 citations omitted). Because Plaintiffs do not identify any misrepresentation of fact, they do not  
23 state a claim for fraud.

24 **D. Plaintiffs Fail to State a Claim for a Violation of Washington's Consumer  
25 Protection Act, RCW 19.86.020**

26 Plaintiffs have plead an alternative claim for a violation of Washington's Consumer  
Protection Act, RCW 19.86.020 ("CPA"). Namely, they assert that if Plaintiffs are deemed to be



1 independent contractors, Defendants' failure to pay Roberta Picu the contractually agreed  
 2 monthly amount of \$3,000 was an unfair and deceptive act or practice in violation of the CPA.  
 3 Complaint, ¶ 69. The CPA prohibits "[u]nfair methods of competition and unfair or deceptive  
 4 acts or practices in the conduct of any trade or commerce." RCW 19.86.020.  
 5

6 To establish a claim under the CPA, a party must prove: (1) defendant committed an  
 7 unfair or deceptive act or practice, (2) in trade or commerce, (3) that impacted the public interest,  
 8 (4) causing injury to plaintiff in its business or property, and (5) a causal link between the unfair  
 9 or deceptive act and the injury suffered. *Hangman Ridge Training Stables, Inc., v. Safeco Title*  
 10 *Ins. Co.*, 105 Wn.2d 778, 783, 719 P.2d 531 (1986).  
 11

12 The first element of a private CPA action is an unfair or deceptive act or practice. *Id.* at  
 13 785. The second element which a private plaintiff must establish is that the act or practice  
 14 complained of occurred in the conduct of trade or commerce. *Id.* These first two elements may  
 15 be established by a showing that (1) an act or practice *which has a capacity to deceive a*  
 16 *substantial portion of the public* (2) has occurred in the conduct of any trade or commerce.<sup>6</sup> *Id.*  
 17 at 785-86 (emphasis added). Alternatively, these two elements may be established by a showing  
 18 that the alleged act constitutes a per se unfair trade practice. A per se unfair trade practice exists  
 19 when a statute which has been declared by the Legislature to constitute an unfair or deceptive act  
 20 in trade or commerce has been violated.  
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25 <sup>6</sup> The CPA does not define "unfair or deceptive" for purposes of the first element. Whether an act is unfair or  
 26 deceptive is a question of law. *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 150, 930 P.2d 288  
 (1997).

1 Plaintiffs have failed to establish the first two elements because they cannot show that the  
 2 conduct complained of has a capacity to deceive a substantial portion of the public. On the  
 3 contrary, this is a private contractual dispute between two parties. There is no indication that  
 4 Defendants' conduct is capable of deceiving the public.  
 5

6 Furthermore, Plaintiff have failed to allege a *per se* violation. There is no statute which  
 7 Plaintiffs allege Defendants violated in which the Legislature has expressly indicated the  
 8 violation thereof constitutes an unfair or deceptive act in violation of trade or commerce. Unlike  
 9 a number of other state statutes, the MWA does not contain the operative language, *i.e.*, "Such a  
 10 violation is an unfair or deceptive act in trade or commerce and an unfair method of competition  
 11 for the purpose of applying the consumer protection act, chapter 19.86 RCW." *See, e.g.*, RCW  
 12 48.102.180 (insurance); RCW 19.166.100 (international student exchange); RCW 46.35.050  
 13 (recording devices in motor vehicles); RCW 18.11.260 (auctioneers); RCW 61.24.135 (deeds of  
 14 trust).  
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18 The third element requires a public interest showing. *Hangman Ridge*, 105 Wn.2d at  
 19 785-87. Where the transaction is essentially a private dispute, as is the case here, it is difficult to  
 20 show that the public has an interest in the subject matter. Generally, a breach of a private  
 21 contract affecting no one but the parties to the contract is not an act or practice affecting the  
 22 public interest. *Lightfoot v. MacDonald*, 86 Wn.2d 331, 334, 544 P.2d 88 (1976). It is the  
 23 likelihood that additional plaintiffs have been or will be injured in exactly the same fashion that  
 24 changes a factual pattern from a private dispute to one that affects the public interest. *McRae v.*  
 25  
 26

1 *Bolstad*, 101 Wn. at 166, 676 P.2d 496. Here, there is no likelihood that other plaintiffs have  
 2 been or will be injured in exactly the same fashion.

3 Factors indicating public interest in this context include: (1) Were the alleged acts  
 4 committed in the course of defendant's business? (2) Did defendant advertise to the public in  
 5 general? (3) Did defendant actively solicit this particular plaintiff, indicating potential  
 6 solicitation of others? (4) Did plaintiff and defendant occupy unequal bargaining positions?  
 7  
 8 *Hangman Ridge*, 105 Wn.2d at 790. As with the factors applied to essentially consumer  
 9 transactions, not one of these factors is dispositive, nor is it necessary that all be present. The  
 10 factors in both the “consumer” and “private dispute” contexts represent indicia of an effect on  
 11 public interest from which a trier of fact could reasonably find public interest impact. *Id.* at 790-  
 12 91. Additionally, the public interest element may be satisfied *per se*. The *per se* method requires  
 13 a showing that a statute has been violated which contains a specific legislative declaration of  
 14 public interest impact. *Id.* at 791.

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 16  
 17 The fourth element of a private CPA action requires a showing that plaintiff was injured  
 18 in his or her “business or property.” RCW 19.86.090. Opinions of the Supreme Court have  
 19 focused on the need for a specific showing of injury. *See, e.g., Cooper's Mobile Homes, Inc. v.*  
 20 *Simmons*, 94 Wn.2d 321, 327, 617 P.2d 415 (1980) (CPA plaintiffs must show that injury  
 21 resulted from defendant's acts); *Seattle Rendering Works, Inc. v. Darling-Delaware Co.*, 104  
 22 Wn.2d 15, 701 P.2d 502 (1985) (unless plaintiffs are injured, they cannot prevail under the  
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 26

1 CPA). The injury involved need not be great, but it must be established. *Hangman Ridge*, 105  
 2 Wn.2d at 791.

3 The fifth element is that of causation. Only a person “injured in his business or property  
 4 by a violation of RCW 19.86.020...” may bring a private action. RCW 19.86.090. A causal link  
 5 is required between the unfair or deceptive acts and the injury suffered by plaintiff. *Hangman*  
 6 *Ridge*, 105 Wn.2d at 791.

7 At a minimum, Plaintiffs have failed to establish the first three elements of the claim  
 8 because they cannot show that the conduct complained of has a capacity to deceive a substantial  
 9 portion of the public. Hence, their CPA claim should be dismissed.

#### 10 IV. CONCLUSION

11 For the reasons stated above, the Court should dismiss Plaintiffs' claims against  
 12 Defendants for fraud and violations of the FLSA, MWA, and CPA with prejudice.

13 DATED 18th day of March, 2014.

14 LASHER HOLZAPFEL  
 15 SPERRY & EBBERSON, P.L.L.C.

16 /s/ Robin Williams Phillips  
 17 Robin Williams Phillips, WSBA No. 17947  
 18 Hillary J. Collyer, WSBA No. 45940  
 19 Attorneys for Defendants

**DECLARATION OF SERVICE**

I hereby certify that on the date signed below, I caused the foregoing pleading to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

**Attorneys for Plaintiffs:**

John G. Barton  
THE BARTON LAW FIRM  
222 Everett Mall Way, No. 61  
Everett, WA 98204

Email: [thebartonlawfirm@gmail.com](mailto:thebartonlawfirm@gmail.com)

Signed at Seattle, Washington this 18th day of March, 2014.

LASHER HOLZAPFEL  
SPERRY & EBBERSON, P.L.L.C.

/s/ Robin Williams Phillips  
Robin Williams Phillips, WSBA No. 17947  
Hillary J. Collyer, WSBA No. 45940  
Lasher Holzapel Sperry & Ebberson, PLLC  
601 Union Street, Suite 2600  
Seattle, WA 98101-4000  
Telephone: (206) 624-1230  
Facsimile: (206) 340-2563  
[phillips@lasher.com](mailto:phillips@lasher.com)  
[collyer@lasher.com](mailto:collyer@lasher.com)  
*Attorneys for Defendants*